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No. 73-267

Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1973

DAVID H. BARAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Claims

PETITIONER'S REPLY TO THE RESPONSE

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Petitioner submits this reply brief to the memorandum for the United States in opposition to the petition for a writ of certiorari pursuant to Rule 24 of the Supreme Court Rules.

Petitioner respectfully submits that the memorandum for the United States is misleading or inaccurate in several respects, and that it raises certain arguments not previously raised.

1. Petitioner's written response to the agency's charges raised procedural objections to the proceedings against him. Respondent's memorandum contends that it did not, and incorrectly asserts that petitioner had no procedural objections until after the administrative proceedings were completed. (R. Memo 1, 2) The fact is that petitioner raised a procedural objection in his written response to the charges, and then a second one a short time later orally – both were raised prior to removal. Petitioner's first objection, in the written response, was to the use of procedures under the Lloyd-La Follette Act, 5 U.S.C. 7501. It was his position that no adverse action was warranted under the circumstances, but that should one nevertheless be initiated the procedures under the Performance Rating Act, 5 U.S.C. 4304,[a] would be more appropriate and should be followed. The latter Act accords the employee greater procedural protection in that it requires that an employee whose work is not satisfactory be given a 90-day advance warning that his work will be rated unsatisfactory, and a reasonable opportunity to demonstrate satisfactory performance. It should be noted that petitioner was never given such a warning, that he was never given an unsatisfactory performance rating, and that the periodic performance rating which was due early in September 1965, nearly three months prior to issuance of the letter of charges, was withheld on grounds which did not comply with the pertinent agency regulations. Under circumstances, such as here, where action may be taken under either statute, use of the procedures under the Lloyd-La Follette Act with its narrower procedural protection for the employee, when not warranted, is in effect

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[a] See page A.1 for text of the Performance Rating Act.

a circumvention of the employee's greater procedural protection under the Performance Rating Act. Petitioner objected on these grounds to the use of the procedures under the statute with the narrower procedural protection for the employee.

Following denial of his first objection petitioner raised the second procedural issue; he objected to the adverse action being taken prior to a hearing, presentation of witnesses and documentary evidence, confrontation and cross-examination of witnesses, and a decision by a neutral body – thus raising the due process issue. The objection was made orally on, or shortly after, January 21, 1966 when petitioner was informed that his written response to the charges was unavailing. It too was denied; the denial was oral. (Pet. 4)

It should be noted, in addition, that the fact that the objection was raised at the time stated has heretofore not been controverted.

The above facts negate respondent's contention that "petitioner did not raise a due process challenge to the governing removal procedures at the administrative level", and negate also respondent's attempt to distinguish on this ground the facts in this case from those in *Arnett v. Kennedy*, No. 72-1118, probable jurisdiction noted April 2, 1973. (R. Memo. 2)

2. Respondent's memorandum gives a misleading impression with regard to the hearing at the Civil Service Commission. It was not a *de novo* hearing in the true sense of the term. (R. Memo. 2, 3) The record shows that at the inception of the hearing petitioner moved for a truly *de novo* hearing with the respondent required to put on his case first and to bear the initial burden of persuasion. Petitioner's motion was denied and he excepted.

Petitioner was required, we believe erroneously, to put his case on first, and had the initial burden of persuasion.

3. Respondent disposes of petitioner's "other contentions" by alleging that these relate principally to the factual basis for his removal, and that further review of this evidentiary question was not warranted. (R. Memo. 3) The reference to "other contentions" is to the points raised in Arguments 4 and 5 of the petition. Argument 4 deals with whether "the entire administrative action is clouded by evidence of bad faith and procedural flaws", and the points discussed give five examples in support of the argument. (Pet. 9-12) Argument 5 deals with whether "the Court of Claims erroneously granted the government's motion for summary judgment". (Pet. 12-14) As can be seen, neither argument relates principally to the factual basis for petitioner's removal, and respondent's argument to this effect is inconsistent with the facts.

4. Also inconsistent with the facts are the suggestions in respondent's memorandum that petitioner at any time knowingly waived any of his rights, or that the procedural defects have been substantially cured.

For the foregoing reasons, and those previously advanced in the petition, it is respectfully submitted that the petition for a writ of certiorari should be allowed.

WHITFORD STOKES,
Attorney for Petitioner

APPENDIX

§4304. Ratings for performance

(a) Each performance-rating plan shall provide for ratings representing at least –

(1) satisfactory performance;

(2) unsatisfactory performance; and

(3) outstanding performance.

(b) An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory.

(c) A performance rating of outstanding may be given only when all aspects of performance not only exceed normal requirements but are outstanding and deserve special commendation. Pub.L. 89-554, Sept 6, 1966, 80 Stat. 440.